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No. _____

In The

Supreme Court of the United States

October Term, 1994

SUSAN AMELIA WOODARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED FOR REVIEW

The decision of the Supreme Court of Alabama, holding that a death penalty statute which predicates "death eligibility" solely on the age of the victim, with no other contributing, or attendant factors requisite to its applicability, is constitutionally valid; is erroneous and contravenes established judicial precedent by this Court, regarding a defendant's constitutional rights under the Fifth, Eighth and Fourteenth Amendments of the UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OTHER AUTHORITIES	iv
REFERENCE TO LOWER COURT DECISIONS	v
JURISDICTION	1
RELEVANT STATUTORY PROVISION	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	5
ARGUMENT	12
CONCLUSION	18
REQUEST FOR ORAL ARGUMENT	19
CERTIFICATE OF SERVICE	20

APPENDIX

A: August 3, 1993, Order from Circuit Court of Montgomery County, Alabama ..... App. 1

B: August 12, 1993, Order from Circuit Court of Montgomery County, Alabama ..... App. 11

C: September 14, 1993, Order of Alabama Court of Criminal Appeals ..... App. 15

D: September 30, 1993, Order of Alabama Court of Criminal Appeals ..... App. 33

E: February 4, 1994, Order of Alabama Supreme Court ..... App. 34

TABLE OF AUTHORITIES

Cases: **Page**

Ballew v. Georgia, 435 U.S.223 (1978) 16

Beck v. State, 396 So.2d 645 (Ala. 1980) 13, 14, 17

Furman v. Georgia, 408 U.S. 238, 313, 92 S.Ct. 2726, 2763, 33 L.Ed.2d 346 (1972) 10, 13, 15

Godfrey v. Georgia, 446 U.S. 420, 427-428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398, 406 (1980) 10, 12

Goodson v. State, 588 So.2d 509, 514 (Ala.Cr.App. 1991) 11

Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 858 (1976) 10, 13, 15

Harris v. Rivera, 454 U.S.339 (1981) 16

Ex parte Jackson, 614 So.2d 405 (Ala. 1993) 14

Ex parte Johnson, 620 So.2d 709 (Ala. 1993). 14

Jordan v. DeGeorge, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951) 10

Ex parte Kyser, 399 So.2d 330 (Ala. 1981) 14, 17

Lockhart v. McCree, 476 U.S. 162 (1986) 16

Morris v. Mathews, 475 U.S. 237 (1986) 16

Ross Neely Express, Inc. v. Alabama Department of Environmental Management, 437 So.2d 82 (Ala. 1983) 9

Tapp v. Lucas, 658 F.2d 383 (5th Cir. 1981) 16

Wainwright v. Witt, 469 U.S. 810 (1985) 16

Woodson v. North Carolina, 428 U.S. 280 (1976) 13

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983) 7

TABLE OF AUTHORITIES (Continued)

Page

Other Authorities:

§13A-5-40(a)(15), **Code of Alabama**, (1975, as rev.) ..... *passim*

UNITED STATES CONSTITUTION

Fifth Amendment 12, 13, 15

Sixth Amendment 13, 15

Eighth Amendment 13, 15

Fourteenth Amendment 12, 13, 15

STATE OF ALABAMA CONSTITUTION 9, 13, 15

The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 852 (1970) 9

REFERENCE TO LOWER COURT OPINIONS

EXHIBITS

EXHIBIT "A"

Exhibit "A" attached to PETITIONER'S Petition For Writ of Certiorari is the Order of the Circuit Court dated August 3, 1993, denying PETITIONER'S Motion To Dismiss The Indictment and Memorandum Opinion of the court in support thereof. References to this document shall be designated as "A".

EXHIBIT "B"

Exhibit "B" attached to PETITIONER'S Petition For Writ of Certiorari is the Order of the Circuit Court dated August 12, 1993, granting PETITIONER'S Motion To Postpone Trial in order to seek appellate review of the trial court's denial of PETITIONER'S Motion To Dismiss The Indictment. References to this document shall be designated as "B".

EXHIBIT "C"

Exhibit "C" attached to PETITIONER'S Petition For Writ of Certiorari is the decision of the Alabama Court of Criminal Appeals issued September 14, 1993, denying PETITIONER'S Petition For Writ Of Mandamus. References to this document shall be designated as "C".

EXHIBIT "D"

Exhibit "D" attached to PETITIONER'S Petition For Writ of Certiorari is the Order issued by the Alabama Court of Criminal Appeals dated September 30, 1993, denying PETITIONER'S Application For Rehearing. References to this document shall be designated as "D".

EXHIBIT "E"

Exhibit"E" attached to Petition For Writ of Certiorari is the Order issued by the Supreme Court of Alabama dated February 4, 1994, denying PETITIONER'S Petition For Writ of Certiorari to the Alabama Supreme Court. References to this document shall be designated as "E".

No. _____

In The

Supreme Court of the United States

October Term, 1994

SUSAN AMELIA WOODARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Decision of the Supreme Court of Alabama, denying Petitioner's Petition For Writ of Certiorari to that court was rendered on February 4, 1994. Jurisdiction to review the judgment in the lower court by Writ of Certiorari is vested in this Court; pursuant to Title 28 **U.S.C.** Sec. 1254(1).

RELEVANT STATUTORY PROVISION

This case involves the constitutionality of Section 13A-40(a)(15), **Code of Alabama** (1975 as rev.), which reads as follows:

"(a) The following are capital offenses:

(15) Murder when the victim is less than 14 years of age."

STATEMENT OF THE CASE

On January 7, 1993, your PETITIONER, SUSAN AMELIA WOODARD, was arrested and charged with the offense of Assault in the First Degree. Pursuant to this charge, it was alleged that PETITIONER did cause serious injury to Elizabeth B. (Dowe) Franklin, a minor child; by shaking her.

On January 9, 1993, at approximately 0800 hours, Elizabeth Franklin expired at Jackson Hospital. Thereafter, the foregoing charge was amended, whereupon PETITIONER was re-arrested and charged with capital murder, in violation of §13A-5-40(a)(15), **Code of Alabama** (1975, as rev.).

On April 9, 1993, this matter was submitted to the MONTGOMERY COUNTY GRAND JURY for consideration. After receiving testimony and the presentation of related evidence, the GRAND JURY returned a True Bill; indicting PETITIONER for the offense of capital murder, as set forth below:

"The Grand Jury of said County charge that before the finding of this indictment,

SUSAN AMELIA WOODARD, alias
SUSAN WOODARD ANDERSON,

whose name is otherwise unknown to the Grand Jury, with intent to cause the death of another person, did cause the death of Elizabeth Dowe Franklin, who was less that fourteen years of age, by shaking and/or hitting her with her hand or hands, in violation of Section 13A-5-40 of the **Code of Alabama**,

against the peace and dignity of the State of Alabama."

Although not set forth in the foregoing indictment, charges against PETITIONER were brought under the auspices of Act 92-601, which amended Section 13A-5-40, **Code of Alabama,** (1975) to read, *inter alia*, as follows:

(a) The following are capital offenses:

"(15) Murder when the victim is less than 14 years of age."

On April 28, 1993, PETITIONER, by and through counsel, filed a Motion to Dismiss the Indictment with the trial court. As grounds therefore, it was asserted, *inter alia:*

"1. That the capital murder statute, Section 13A-5-40(a)(15), **Code of Alabama,** (1975) is unconstitutional.

2. That the capital murder statute, Section 13A-5-40(a)(15), **Code of Alabama**, (1975) is unconstitutional as applied to the Defendant's case.

3. That the capital murder statute, Section 13A-5-40(a)(15), **Code of Alabama**, (1975) is unconstitutional as it is based on age, which, in itself, is discriminatory.

4. That the victim is less than 14 years of age. The age of the victim in itself, should not cause Defendant to be charged with capital murder.

5. That the Defendant was attempting to resuscitate and render aid and assistance to the victim as the victim was unresponsive and comatose.

6. That there was no intent by the Defendant to injure the victim in any manner. Therefore, as "intent" is a requisite element of the underlying offense of murder contained in the charge of capital murder, the present charge assessed against Defendant cannot be sustained.

7. That the capital murder indictment was filed in violation of the Defendant's constitutional rights as set out in the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States and also in violation of the Constitution of the State of Alabama."

On July 2, 1993, a hearing was held before the Honorable WILLIAM A. GORDON, on the merits of PETITIONER'S Motion To Dismiss. At the conclusion of this hearing, JUDGE GORDON issued an Order on August 3, 1993; denying PETITIONER'S Motion to Dismiss Indictment ("A".11).

On August 6, 1993, PETITIONER, by and through counsel, filed a Motion For Postponement of Trial with the trial court. In this Motion, PETITIONER requested that the trial be postponed until such time as the trial court's decision denying PETITIONER'S Motion To Dismiss The Indictment had been submitted to the Court of Criminal Appeals for review. In addition thereto, counsel for PETITIONER averred to the trial court that said Motion was made in an effort to negate the possibility of multiple trials in the event of a ruling in favor of PETITIONER on her motion. On August 9, 1993, in response thereto, the State filed an objection to PETITIONER'S Motion For Postponement of Trial.

On August 12, 1993, a hearing was held before the Honorable WILLIAM A. GORDON, on the merits of PETITIONER'S Motion For Postponement of Trial. At this hearing, counsel for PETITIONER, expressed his intent to file a Petition For Writ of Mandamus with the Court of Appeals. At the conclusion of this hearing, Judge Gordon issued an Order in which he granted PETITIONER'S Motion For Postponement of Trial; contingent upon the filing, by counsel for PETITIONER, of a Writ of Mandamus before the close of business August 13, 1993 ("B".4).

On August 13, 1993, PETITIONER, by and through counsel, filed a Petition For Writ of Mandamus with the

Alabama Court of Criminal Appeals, as directed by the trial court. In this Petition, *inter alia,* PETITIONER sought appellate review of the trial court's denial of her Motion to Dismiss the Indictment. On September 14, 1993, in response thereto, that Court entered an Order denying said Petition; holding that Section 13A-5-40(a)(15), **Code of Alabama** (1975, as rev.) is not unconstitutional ("C".20).

On September 28, 1993, PETITIONER, by and through counsel, filed an Application For Rehearing of the foregoing ruling with the Alabama Court of Criminal Appeals. On September 30, 1993, that Court issued an Order denying PETITIONER'S Application For Rehearing. ("D".1).

On October 14, 1993, Petitioner by and through Counsel, filed a Petition For Writ of Certiorari with the Supreme Court of Alabama. On February 4, 1994, in response thereto, the Alabama Supreme Court entered an Order denying the petition.

Petitioner, Susan Amelia Woodard, by and through counsel, prays that a Writ of Certiorari be issued to review the Judgement of the Alabama Supreme Court.

STATEMENT OF THE FACTS

Your PETITIONER, SUSAN AMELIA WOODARD, is a 37 year old female and single mother of a 3 year old daughter. At the time of the incidents in question, PETITIONER was duly licensed to operate a day care facility by the Alabama Department of Human Resources. In accordance therewith, the decedent, ELIZABETH DOWE FRANKLIN, [hereinafter referred to as "DOWE"] was placed in PETITIONER'S care and custody several days each week, over the months preceding the incidents in question.

The incidents in question, which form the underlying basis for the charges assessed against PETITIONER occurred on December 29, 1992 and January 6, 1993.

On the morning of December 29, 1992, DOWE was placed in the custody of PETITIONER at PETITIONER'S home, as usual. While playing, she and another toddler, SHEA, apparently bumped into each other; knocking each other to the floor. SHEA was getting up from the floor and DOWE was laying on the floor; when PETITIONER ran to the children and picked up SHEA. She then turned to retrieve DOWE. As she attempted to raise her, DOWE slipped from her grasp and fell back on the cushioned tile floor. She exhibited no ill effects from this fall.

On the morning of January 6, 1993, some eight (8) days later, Dowe was delivered to PETITIONER'S home by her mother, DALE FRANKLIN. MRS. FRANKLIN stated that the child had slept little the night before and had refused all nourishment. Due to the child's listless manner, PETITIONER placed the child in the play pen to rest. Dowe continued to be lethargic and repeatedly refused all nourishment. While checking on her, PETITIONER observed that the child had regurgitated. As she lifted her to clean her, PETITIONER observed the child's eyes "appear to roll back in her head". Alarmed, PETITIONER immediately reacted by removing her from the play pen and attempted to get a response from the child by briefly shaking her. As PETITIONER reached for a paper towel from the box on the floor, the child's body went completely limp. PETITIONER continued to administer to the child. However, receiving no significant response, she immediately contacted the paramedics for assistance. Subsequently, the child was hospitalized.

On January 7, 1993, PETITIONER was arrested and charged with Assault in the First Degree. Pursuant to this charge, it was alleged that PETITIONER did cause serious injury to Elizabeth B. (DOWE) Franklin, a minor child; by shaking her.

On January 9, 1993, at approximately 0800 hours, Elizabeth Franklin expired at Jackson Hospital. Thereafter, the foregoing charge was amended, whereupon PETI-

TIONER was re-arrested and charged with capital murder, in violation of §13A-5-40(a)(15), **Code of Alabama** (1975, as rev.); due solely to the age of the decedent. This subsection, enacted in 1992, amended the Alabama Death Act to include the following as a chargeable capital offense:

> "(a) The following are capital offenses:
>
> (15) Murder when the victim is less than fourteen years of age."

On April 28, 1993, PETITIONER, by and through counsel, filed a Motion to Dismiss the Indictment with the trial court; alleging, *inter alia*, that this newly enacted provision of the Alabama Death Act was unconstitutional.

On July 2, 1993, a hearing was held before the Honorable WILLIAM A. GORDON, on the merits of PETITIONER'S Motion To Dismiss. On August 3, 1993, JUDGE GORDON issued an Order on August 3, 1993; denying PETITIONER'S Motion to Dismiss Indictment ("A".11). However, at the inception of this Order, the trial court specifically noted that the statute in question, failed to set forth any rationale, or substantive basis for the specific provision under which PETITIONER was charged. In making this observation, Judge Gordon noted:

> "There is no legislative history or findings which assists the Court in determining the legislative purpose in enacting this new capital offense or why 14 was chosen as the age component."

Moreover, the Court noted that:

> "When a state enacts death penalty legislation, it is **constitutionally required** to enact a statutory scheme that provides an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed"; quoting ***Zant v. Stephens***, 462 U.S. 862, 886, 103 S.Ct. 2733, 2747 (1983). [Emphasis added].

In conclusion, JUDGE GORDON held that §13A-5-40(a)(15), **Code of Alabama** (1975 as rev.), which prefaces the charge of capital murder solely on the age of the victim and specifies no attendant, requisite factors, surmounted PETITIONER'S constitutional challenge; ruling that it "sufficiently narrows the class of persons who are ultimately death eligible" ("A".6). However, JUDGE GORDON contemporaneously acknowledged that the Alabama Death Act is not uniform in its substantive definitions of capital offenses ("A".4).

On August 6, 1993, PETITIONER, by and through counsel, filed a Motion For Postponement of Trial with the trial court. In this Motion, PETITIONER requested that the trial be postponed until such time as the trial court's decision denying PETITIONER'S Motion To Dismiss The Indictment had been submitted to the Court of Criminal Appeals for review.

On August 12, 1993, a hearing was held on the merits of PETITIONER'S Motion For Postponement of Trial. At this hearing, counsel for PETITIONER, expressed his intent to file a Petition For Writ of Mandamus with the Court of Appeals. In accordance therewith, counsel represented to JUDGE GORDON that primary argument would be predicated on the issue that the newly enacted statute under which PETITIONER was charged, predicating the capital offense solely on the death of a child under 14 years of age is an arbitrary and capricious legislative act which violates both the **United States Constitution** and the **Constitution of Alabama**. At the conclusion of this hearing, JUDGE GORDON, noting that PETITIONER'S claims presented a question of first impression in Alabama, issued an Order in which he stated:

> "The Court recognizes the grounds for the State's objection to Woodard's [PETITIONER] motion. In addition, the Court, as does the State, recognizes that no party wishes to try this case twice in the event Section 13A-5-40(15) is ultimately found to violate the state or federal constitutions."

Continuing, the trial court stated:

> "Under the circumstances this Court also believes that Woodard should have the opportunity to seek appellate review before the case is tried."

In conclusion, that court stated:

> "For the foregoing reasons, it is ORDERED that the trial of this case is postponed if Woodard's counsel files a petition for writ of mandamus before the close of business on August 13, 1993." ("B".4).

On August 13, 1993, PETITIONER, by and through counsel, filed a Petition For Writ of Mandamus with the Alabama Court of Criminal Appeals. In this Petition, *inter alia,* PETITIONER sought appellate review of the trial court's denial of her Motion to Dismiss the Indictment and moved that court to grant her Petition For Writ of Mandamus.

On September 14, 1993, the Alabama Court of Criminal Appeals entered an Order denying the foregoing Petition. In this decision, the Alabama Court of Criminal Appeals addressed, *inter alia,* three (3) points of inquiry, as set forth in the Petition. First, the Court stated that §13A-5-40(a)(15), **Code of Alabama** (1975 as rev.) is not constitutionally overbroad. Quoting ***The First Amendment Overbreadth Doctrine***, 83 Harv. L. Rev. 844, 852 (1970), the court noted that "Historically, the overbreadth doctrine has been used by the federal courts to prevent a chilling effect on First Amendment freedoms...". However, the Court acknowledged that the overbreadth doctrine under the **Alabama Constitution** has been applied in due process cases not involving first amendment freedoms; ***Ross Neely Express, Inc. v. Alabama Department of Environmental Management***, 437 So.2d 82 (Ala. 1983). Continuing, the Court noted that in ***Ross Neely Express***, *supra*, JUSTICE ADAMS wrote;

> "The right to due process is guaranteed to the citizens of Alabama under the Alabama Constitution of 1901, Article 1, Sections 6 and 13....The courts have found that this right is violated when a statute or regulation is **unduly vague, unreasonable or overbroad...**"("C".4-5). [Emphasis added].

Secondly, the Alabama Court of Criminal Appeals held that §13A-5-40(a)(15), **Code of Alabama** (1975 as rev.) is not constitutionally vague. Quoting ***Jordan v. DeGeorge***, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951), the Court stated that the essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. The Court concluded that §13A-5-40(a)(15) provided sufficient warning of the criminal conduct outlined therein.

Thirdly, the Alabama Court of Criminal Appeals held that §13A-5-40(a)(15), **Code of Alabama** (1975 as rev.) "is not unconstitutional because it is arbitrary, or because it fails to sufficiently narrow the class of people that may become "death eligible". Quoting from ***Gregg v. Georgia***, 428 U.S. 153,188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 858 (1976), which quoted the decision in ***Furman v. Georgia***, 408 U.S. 238, 313, 92 S.Ct. 2726, 2763, 33 L.Ed.2d 346 (1972); the Court stated:

> "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'".
>
> "This means that if a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

See also, ***Godfrey v. Georgia***, 446 U.S. 420, 427-428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398, 406 (1980).

Fourth, the Court of Criminal Appeals held that Alabama's capital offense statutes, including §13A-5-40(a)(15), **Code of Alabama** (1975, as rev.) are neither arbitrary or capricious and therefore, the subsection in question is not unconstitutional ("C".20). However, it should be noted that the judicial authority cited by that Court in support of this position **pre-dated** the adoption of and inclusion of this provision in the Alabama Death Act ("C".10).

In conclusion, the Alabama Court of Criminal Appeals held that §13A-5-40(a)(15), **Code of Alabama** (1975, as rev.) is not violative of any equal protection right afforded under the **UNITED STATES CONSTITUTION** and **The Alabama Constitution**. In support of this position, the Court reiterated its decision in ***Goodson v. State***, 588 So.2d 509, 514 (Ala.Cr.App. 1991) in which it held:

> "The Equal Protection Clause of the Fourteenth Amendment goes no further than to prohibit invidious discrimination...If there is some reasonable basis for the recognition of separate classes and if the disparate treatment of the classes has a rational relation to the object sought to be achieved by the lawmakers, the Constitution is not offended. The transgression arises only when the classification rests upon grounds wholly irrelevant to achievement of the State's objective; the separate treatment must admit of but one conclusion beyond a rational doubt, i.e., that the basis therefore is arbitrary and unreasonable and without relevance to the legislative goal."

Thereafter, the Alabama Court of Appeals stated that the Petition For Writ of Mandamus was denied ("C".20).

On September 28, 1993, PETITIONER, by and through counsel, filed an Application For Rehearing of the foregoing ruling with the Court of Criminal Appeals. On September 30, 1993, in response thereto, that court issued an Order denying PETITIONER'S Application For Rehearing ("D".1).

On October 14, 1993, PETITIONER, by and through counsel, filed a Petition For Writ of Certiorari with the Supreme Court of Alabama.

On February 11, 1994, the Supreme Court of Alabama issued an Order denying this Petition ("E".1).

ARGUMENT

THE DECISION OF THE SUPREME COURT OF ALABAMA HOLDING A DEATH PENALTY STATUTE WHICH PREDICATES "DEATH ELIGIBILITY" SOLELY ON THE AGE OF THE VICTIM, WITH NO OTHER CONTRIBUTING OR ATTENDANT FACTORS REQUISITE TO ITS APPLICABILITY TO BE CONSTITUTIONALLY VALID, IS ERRONEOUS AND CONTRAVENES ESTABLISHED JUDICIAL PRECEDENT BY THIS COURT, REGARDING A DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Section 13A-5-40(a)(15) of the capital murder statute, making age "the sole, aggravating factor for establishing a capital offense does not adequately narrow the class of murders that may result in imposition of the death penalty. Accordingly it is violative of the Due Process protection afforded under the Fifth and Fourteenth Amendments of the UNITED STATES CONSTITUTION.

Therefore, the dispositive issue argued herein to this Court by PETITIONER is whether the statutory provision, under which Petitioner is charged, that automatically turns the murder of a person less than fourteen years of age, – **without further, attendant circumstances** – into a capital crime is sufficiently tailored to avoid arbitrary and capricious outcomes. ***Godfrey v. Georgia***, 446 U.S. 420 (1980). The State contends that it is. Petitioner, however, maintains that Section 13A-5-40(a)(15), **Code of**

Alabama (1975 as rev.) is unconstitutional because the unavoidable result of its application is an application of law in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the **UNITED STATES CONSTITUTION** and Article I, Section 1, 6, and 15 of the **Alabama Constitution.**

In support of this position, Petitioner, by and through counsel predicates her argument with the advancement of two vital and important points. First, Petitioner does **not** ask this Court to decide whether it is within the Legislature's purview to accord special protection to children of tender years. The fact that the Legislature has that right and that obligation is not in dispute. Secondly, Petitioner does **not** ask this Court to decide whether the Legislature could have adopted a different approach to the classification of capital offenses in Alabama, which might have rendered Section 13A-5-40(a)(15) constitutional. The fact that some states have chosen to enact statutes that narrow the cases eligible for the death penalty at the sentencing phase alone does not alter the fact that this state chose, as a matter of policy, to adopt a two-tier classification scheme to satisfy the due process requirements of ***Furman v. Georgia***, 408 U.S. 238 (1972), ***Gregg v. Georgia***, 428 U.S. 153 (1976), and ***Woodson v. North Carolina***, 428 U.S. 280 (1976).

Under the provision of the original enactment of the Alabama Death Act, Section 13A-5-40, **Code of Alabama** (1975), the Alabama Legislature determined that, although all murders are felonies, only certain murders would be classified as capital offenses. Each of those murders had to be characterized by some aggravating factor that distinguished it from other murders. As set forth by this Court in ***Beck v. State***, 396 So.2d 645 (Ala. 1980), "each of the crimes specified requires an intentional killing with aggravation." For example, an intentional killing committed during a kidnapping, rape, robbery, or nighttime burglary of an occupied dwelling, is designated as an "offense committed under aggravated circumstances." *See,*

e.g., ***Ex parte Johnson***, 620 So.2d 709 (Ala. 1993) (murder occurring during robbery). However, a murder perpetrated without one of the qualifying factors is not even indictable as a capital felony; no matter how brazen, cruel or depraved the crime might be. *See, e.g.*, ***Ex parte Jackson***, 614 So.2d 405 (Ala. 1993) (murder of a bystander killed when a bullet intended for the occupant of a car missed its target could not qualify as a capital offense because the statute is limited to victims shot while inside a motor vehicle); and ***Ex parte Kyzer***, 399 So.2d 330, 337 (Ala. 1981).

A second, and equally, vital component of the Alabama mandated "narrowing scheme", is a separate sentencing hearing at which the jury would weigh all mitigating evidence introduced by the defendant against specific aggravating circumstances set forth in Section 13A-5-49, **Code of Alabama** (1975 as rev.), (formerly Section 13-11-6, **Code of Alabama** [1975 as rev.]). *See, **Beck**, supra*. The aggravating circumstances to be considered at sentencing were held to be distinct from those that defined the murder as a capital offense, even though many of them were identical. *Id.* at 663.

In the case at bar, the Supreme Court of Alabama, in denying the Petition For Writ of Certiorari, upheld the rulings of the Alabama Court of Criminal Appeals and the trial court; both of which held that the provision of the Alabama Death Act predicating a capital offense **solely** on the age of the victim, is constitutional because (1) it contains an aggravating element that narrows the class of crimes that can be considered capital – the age of the victim – and (2) the State must still prove that at least one of the statutory aggravating factors in Section 13A-5-49 exists which outweighs any mitigating evidence introduced. However, Petitioner avers to this Honorable Court that these holdings beg the issue presented herein.

Although the age of the victim certainly restricts the number of child murders that are deemed to be capital offenses, it does **not** sufficiently narrow the category in

order to satisfy the commands of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the **UNITED STATES CONSTITUTION**, nor the comparable provisions of the **Alabama Constitution**. This provision of the Capital Murder Statute, as presently written, does not distinguish between the quick or reckless killing of a child under the age of 14 years and the killing of such person under circumstances that reveal wanton cruelty, brutal behavior, or fiendish purposes. As this portion of the statute is presently enacted, every child who is the victim of excessive corporal punishment, every child who dies as the result of ignorant or inappropriate physical handling by an adult, every child who is killed by someone who actually intended to kill another, spawns a capital murder defendant – as long as the child is under 14 years of age. Yet a child who is brutalized or tortured before being killed but is 14 years of age, or older, or a child who is viciously, wantonly, or intentionally killed by another child of tender years, produces someone charged **only** with murder. The tremendous disparity between the potential punishments applicable to a conviction for each of these offenses produces the freakish outcome, the lack of substantive and procedural due process; **indeed**, precisely the type of constitutional infirmity that this Honorable Court found intolerable in ***Furman***, *supra* and ***Gregg***, *supra*.

The dilemma inherent in Section 13A-5-40(a)(15) is that by making the age of the victim the **sole**, aggravating element which elevates a particular murder into a capital offense, the State of Alabama has created a law that subjects certain hapless people to a capital murder indictment; although their actions are less culpable than the actions of others charged only with murder and, therefore, subject to no more than a life sentence. Accordingly, in this manner, Section 13A-5-40(a)(15), **Code of Alabama** (1975 as rev.) is clearly both overbroad and underinclusive.

Although the State of Alabama would argue that the weighing of aggravating and mitigating circumstances,

which occurs at the sentencing phase of a trial suffices to meet the requirements of due process; this argument is disingenuous and non-persuasive. The mere indictment of a person for capital murder radically alters the compromise value of the case. As this Court has repeatedly noted, the nature of a criminal charge often has profound consequences on the willingness of a jury to convict, or the incentive of a defendant to plead to a lesser included offense; ***Morris v. Mathews***, 475 U.S. 237 (1986); ***Harris v. Rivera***, 454 U.S. 339 (1981); ***Ballew v. Georgia***, 435 U.S. 223 (1978), and ***Tapp v. Lucas***, 658 F.2d 383 (5th Cir 1981), *citing* ***Price v. Georgia***, 398 U.S. 323, 331 (1970). It is patently unfair to permit the initial indictment of someone under the auspices of a capital murder statute, when the **only** possible sentences upon conviction are life without parole, or death. In this vein, PETITIONER avers that the theory that the jury's consideration of aggravating and mitigating circumstances during the sentencing phase is adequate protection against arbitrary and capricious punishments is without constitutional persuasion.

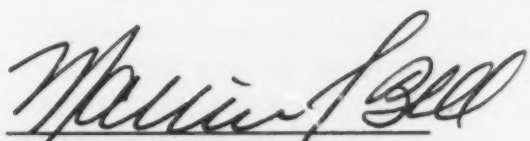
PETITIONER proffers the following rationale in support of her position. First, a jury hearing a capital murder case is "death-qualified"; ***Lockhart v. McCree***, 476 U.S. 162 (1986) (removal for cause, from jury that decides **guilt** phase of capital case, of persons whose attitudes toward capital punishment would prevent, or substantially impair performance of their duties at **punishment** phase does not violate Sixth Amendment right to impartial jury); ***Wainwright v. Witt***, 469 U.S. 810 (1985) (state court's determination regarding exclusion of juror for cause because of views on capital punishment is finding of fact entitled to presumption of correctness). Furthermore, empirical studies have established that death-qualified juries are more predisposed to impose or recommend a sentence of death than those jurors who have not been so qualified. Therefore, any defendant charged with capital murder is placed at an increased risk of a sentence based on caprice or emotion.

Secondly, the only aggravating circumstance under Section 13A-5-49, **Code of Alabama** (1975) possibly applicable to apply to cases such as PETITIONER'S is that the "offense was especially heinous, atrocious or cruel compared to other capital offenses." Where the murder of a child results from bad parenting skills, ignorance, or inadequate impulse control, as so many murders of young children do, the defendant is placed in the untenable position of having to argue that this crime was not heinous, atrocious or cruel. Even with the State's restriction of the "heinous, atrocious or cruel" factor to "those conscienceless or pitiless homicides which are unnecessarily torturous to the victim," ***Ex parte Kyzer***, 399 So.2d 330, 334 (Ala. 1981), the innocence and helplessness of a child victim will always be compelling evidence in the hands of a skillful prosecutor with an unabiding penchant for securing a sentence of death. Given the intrinsically inherent sympathy that most adults have for children and society's natural inclination to find the murder of a child by an adult particularly disturbing, there is a definite and substantial risk that a judge or jury would find the offense charged to be especially "heinous, atrocious or cruel". As this Honorable Court stated in ***Beck v. Alabama***, 447 U.S. 625, 637 (1980),

> "[s]uch a risk **cannot** be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a **significant constitutional difference** between the death penalty and lesser punishments." [Emphasis Added].

CONCLUSION

COMES NOW, Your PETITIONER, SUSAN AMELIA WOODARD, and by and through counsel, respecfully moves this Honorable Court, to grant this Writ of Certiorari and to proceed under its rules to review the matters complained of. Furthermore, PETITIONER moves this Honorable Court to reverse the judgment of the Alabama Supreme Court and direct that court to instruct the Alabama Court of Criminal Appeals to grant PETITIONER'S Petition For Writ of Mandamus and remand this cause to the trial court with instructions to grant PETITIONER'S Motion To Dismiss The Indictment, as well as granting such other relief to which as PETITIONER may be entitled.

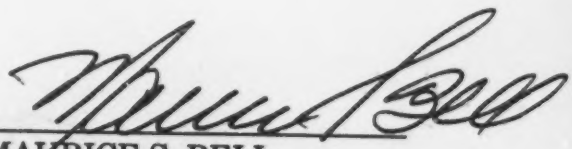


MAURICE S. BELL
Attorney For PETITIONER
547 South Lawrence Street
Montgomery, Al 36104
(205) 262-2719

REQUEST FOR ORAL ARGUMENT

COMES NOW YOUR PETITIONER, by and through counsel, and respectfully moves this Honorable Court to grant Oral Argument with respect to the issues contained herein. In support of this request, PETITIONER avers that determination of these issues will be of considerable importance to the interests of the citizens of the State of Alabama the citizenry of the United States and the general public as a whole. Furthermore, the complexity of said issues raises certain judicial inquiry. A proper resolution of these issues requires oral argument to sufficiently explain certain facets of the case.

Respectfully submitted this the 5th day of May, 1994.



MAURICE S. BELL
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547 South Lawrence Street
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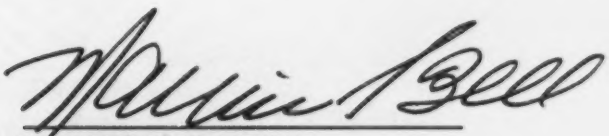
(205) 262-2719

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Honorable William C. Gordon, Montgomery County Circuit Judge, 101 South Lawrence Street, Montgomery, Alabama, 36104; the Honorable Jimmy Evans, Attorney General of Alabama, State House, 11 South Union Street, Montgomery, Alabama, 36130 and the Honorable Ellen Brooks, District Attorney, 101 South Lawrence Street, Montgomery, Alabama, 36104, Hon. Lane Mann, Clerk, Alabama Court of Criminal Appeals, 300 Dexter Avenue, Montgomery, Alabama, 36130 and the Honorable Robert Esdale, Clerk, Supreme Court of Alabama, 300 Dexter Avenue, Montgomery, Alabama, 36130, by placing a copy of same in the United States Mail, postage prepaid, addressed as above, the last known address of each, on this the 5th day of May, 1994.



MAURICE S. BELL
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547 South Lawrence Street
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(205) 262-2719

EXHIBITS

The following exhibits contain both motions filed by your petitioner and orders of the courts in response thereto. In order to comply with the pagination/printing requirements of rule 33.1(c) **Federal Rules of Procedure,** all motions and orders issued by the Circuit Court of Montgomery County, Alabama; the Alabama Court of Criminal Appeals and the Supreme Court of Alabama have been re-paginated.

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

STATE OF ALABAMA,

Plaintiff,

v. CASE NO. CC-93-143-G

JAMES JOHNSON, JR.,
et cetera,

Defendant,

ORDER

STATE OF ALABAMA,

Plaintiff,

v. CASE NO. CC-93-604-G

SUSAN AMELIA WOODARD,

Defendant.

_____/

In accordance with the memorandum opinion entered this date, it is ORDERED that the Defendants' motions to dismiss are denied.

DONE and ORDERED this 3rd day of August, 1993.

/s/ William Gordon

WILLIAM GORDON
CIRCUIT JUDGE

cc: Robert Lusk, Esq.
Randy McNeill, Esq.
Maurice Bell, Esq.
Richard Keith, Esq.
Richard Cohen, Esq.
Dean Mooty, Esq.

EXHIBIT "A"

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT

STATE OF ALABAMA,

Plaintiff,

v. CASE NO. CC-93-143-G

JAMES JOHNSON, JR.,
et cetera,

Defendant,

MEMORANDUM OPINION

STATE OF ALABAMA,

Plaintiff,

v. CASE NO. CC-93-604-G

SUSAN AMELIA WOODARD,

Defendant.

James Johnson, Jr., a/k/a Jamie Luster (Johnson) is indicted for the capital offense in the murder of Jalesa Marshay McQueen, and Susan Amelia Woodard (Woodard) is indicted for the capital offense in the murder of Elizabeth Doyle Franklin. Ala. Code Section 13A-5-40(a)(15) (1975). Johnson and Woodard have filed motions to dismiss the indictments on substantially the same grounds; and the cases are consolidated for the singular purpose of ruling on these motions.[1]

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1. Woodard adopted the brief and arguments of counsel for Johnson. Neither she nor her counsel were present at the argument; however, they indicated no inclination to be present or offer further argument; and they have not objected to this procedure.

1. FACTS

Johnson, an adult, is alleged to have murdered Jalesa McQueen, a child one year and 145 days old, "by hitting, shaking and/or kneeing her." Woodard, an adult, is alleged to have murdered Elizabeth Franklin, a child one year and 93 days old, "by shaking and/or hitting her with her hand or hands."

2. THE ALABAMA DEATH ACT

1992 Ala. Acts 601 further amended the Alabama Death act, 1981 Ala. Acts 178 (the Act) (codified at Ala. Code Section 13A-5-39 to -57 (1975)) by, among other things, adding three new capital offenses. The offense at issue is defined in 1992 Ala. Acts 601 Section 1(a)(15) which provides, as follows:

> (a) The following are capital offenses:
>
> . . . .
>
> (15) Murder when the victim is less than fourteen years of age.

There is no legislative history or findings which assist the Court in determining the legislative purpose in enacting this new capital offense or why 14 was chosen as the age component.

3. CONTENTIONS

Johnson and Woodard contend that Section 1(a)(15) is arbitrary, over broad and discriminatory as enacted and as applied because it predicates the capital offense solely on the age of the victim, and, therefore, does not provide a "meaningful basis for distinguishing cases in which death is imposed from the many cases in which it is not." Johnson's motion at paragraph 4, quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976). They further argue that the statutory sentencing scheme does not sufficiently narrow the class; therefore, the Act violates the Eighth and the Fourteenth Amendments to the United States Constitution, and Article I, Section 1, 6 and 15 of the Alabama Constitution.

The State contends that (1) because the Alabama Criminal Code predicates many felony offenses solely on the age of the victim or the age of the victim and actor,[2] there is no constitutional impediment to defining a capital offense by the age of the victim; (2) the overbreadth doctrine does not apply because there is no first amendment right at issue, and if it does apply, the offense at issue is not over broad because it is specific in defining the offense which is death eligible; (3) Section 1(a)(15) does not violate the due process clause because there is a legitimate relationship to the public purpose in passing the legislation; and (4) it does not violate due process because it operates on all persons alike and does not subject individuals to the arbitrary exercise of the powers of the government.

4. THE MERITS

"Capital punishment . . . is a legislative choice, not a judicial one." Beck v. State, 396 So.2d 645, 655 (Ala. 1980). However, when a state enacts death penalty legislation, it is constitutionally required to enact a statutory scheme that "Provides an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed." Zant v. Stephens, 462 U.S. 862, 886 103 S.Ct. 2733, 2744 (1983). "[T]he narrowing function required for a regime of

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2. See, e.g., Alabama Code § 13A-6-45 (interference with custody); § 13A-6-61(a)(3) (rape first degree); § 13A-6-62(a)(1) (rape second degree); § 13A-6-63(a)(3) (sodomy first degree); § 13-A-6-64(a)(1) (sodomy second degree); § 13A-6-65(a)(3) (sexual misconduct); § 13A-6-66(a)(3) (sexual abuse first degree); § 13A-6-67(a)(2) (sexual abuse second degree); § 13A-6-69 (enticing a child); § 13A-12-191 (dissemination or public display of obscene matter); § 13A-12-196 (parent or guardian permitting child, ward or dependent under 17 to participate in production of obscene matter); § 13A-12-197 (production of obscene matter depicting person under 17 years of age involved in obscene acts); § 13A-12-200.5 (sale or distribution of obscene material to minors); § 13A-12-215 (sale, et cetera, of a controlled substance by person over 18 to a person under 18); § 13A-13-5 (abandonment of child less than 18); and § 13A-13-6(1) & (2) (endangering the welfare of a child.)

capital punishment may be provided by either of two ways: The legislature may itself narrow the definition of capital offenses, . . . , so that the jury finding of guilt response to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." Lowenfield v. Phelps, 484 U.S. 231, 246, 108 S.Ct. 546, 555 (1988).

The Act is not uniform in its substantive definitions of the capital offenses. Under the Alabama Act, it can be said that the capital offenses can be grouped into four categories: (1) nature of the criminal act, Section 13A-5-40(a)(1), (2), (3), (4), (8), (9) & (10); (2) special status of the victim, Section 13A-5-40(a)(5), (11), (14) & (15); (3) a combination of the nature of the criminal act and special status of the victim, Section 13A-5-4)(a)(16) & (17); and (40 special status of the accused, Section 13A-5-40(6) & (13). Joseph A. Colquitt, Pitfalls in Capital Cases, at 5 - 6 (July 14, 1993).

The Act narrows the class of people convicted of murder who are death eligible in three ways. First it narrows the class through definition of the capital offenses. Second, it further narrows the class at the penalty phase by requiring that the state must prove at least one aggravating circumstance beyond a reasonable doubt (Section 13A-5-49).[3] Third, it still further narrows the class by providing automatic appellate review when the death penalty is imposed, which includes proportionality review (Section 13A-5-53).

Johnson and Woodard have cited, by way of example, several capital punishment statutes[4] where the capital offense based on age "Characteristically require[s] some

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3. See Zant v. Stephens, 462, 103 S.Ct. 2747 (1983) (holding that under Georgia's sentencing scheme, the requirement that the jury find at least one aggravating circumstance narrowed the class of persons eligible for the death penalty if the aggravating circumstance is objectively defined).

4. Ill. Code § 9-1(b)(7); Md. Ann. Code Art. 27, § 413(5); Miss. Code Ann. § 97-3-19; Mont. Code Ann. § 46-18-303; and Va. Code Ann. § 18.2-31.8.

other aggravating factor also be present before the defendant is eligible for the death penalty." Johnson's motion, para. 3 at 7. They argue that Alabama, contrary to these statutory schemes, "allows a conviction for capital murder simply because of the age of the murder victim with any other additional factor." Id.

All of the capital offenses defined in the Act require murder plus one or two additional components, e.g., murder during the commission of another specified criminal offense (one additional component), murder of any police officer while such officer is on duty (two additional components). Section 1(a)(15) requires an additional component, i.e., that the victim is less than 14 years of age. In addition, before the defendant is death eligible, the state must prove beyond a reasonable doubt at least one of the aggravating circumstances specified in Section A-5-49. In this regard, the Court notes that no aggravating circumstance in Section 13A-5-49 mirrors the capital offenses at issue.[5] Therefore, it is incorrect to suggest that the offense is death eligible based solely on the age of the victim.

The Court holds that Section 1(a)(15), when considered in context with the other provisions of the Act, sufficiently narrows the class of persons who are ultimately death eligible. the Illinois death statute is sufficiently

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5. In the Alabama Death Act many aggravating circumstances mirror the capital offenses. Thus, in some cases when the state proves the capital offense beyond a reasonable doubt, it simultaneously proves the aggravating circumstance. Put another way, the defendant automatically becomes death eligible in the guilt phase of the trial. When no aggravating circumstance mirrors the capital offense, the defendant does not become death eligible until the state proves an aggravating circumstance in the punishment phase. See Border v. Armonstrout, 713 F.Supp. 1573, 1558 (D. Mo. 1989).

Granted, at least some of the evidence which may tend to prove an aggravating circumstance may be admissible in the guilt phase; however, such evidence is not required to be introduced, and under some circumstances, will not be admissible. An attempt to introduce such evidence could rise to the level of constitutional prejudice to the defendant.

similar to the Alabama Act so that a comparison of the two statutory regimes is possible and is supportive of the Courts' holding.

The Illinois death statute, 720 ILCS 5/9-1 (1992 State Bar Edition), requires that for a defendant to be death eligible he must (1) be found guilty of murder in the first degree; (2) the defendant must be 18 years of age or older;[6] and (3) the murder must have been accompanied by at least one statutory aggravating factor.[7] One of the aggravating factors, Section 5/9-1(b)(7), provides as follows:

> (7) the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty.

If the prosecution requests a sentencing hearing (for the purpose of seeking the death penalty), the fact finder, if it is a jury, must unanimously find beyond a reasonable doubt that one or more Section 5/9-1(b) factors exist,[8] and then "shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death should be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." Section 5/9-1(g). The procedure is the same when the fact finder in the sentencing hearing is the judge. Section 5/9-1(h). A sentence of death is automatically reviewable. Section 5/9-1(i).

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6. Under the Illinois statute, a defendant less than 18 years of age cannot be punished by death.

7. The Illinois death statute also allows consideration of non-enumerated aggravating factors. § 5/9-1(b).

8. Under the Illinois statute it is conceivable that the trial will have three stages: a guilt phase to determine if the defendant is guilty of first degree murder, a second phase to determine if any § 5/9-1(b) aggravating factor is present and, if the state proves an aggravating factor beyond a reasonable doubt, a third phase, to determine if the proper punishment is death.

In Illinois, a defendant is death eligible if he is found guilty of first degree murder; he is 18 or older; the victim was under 12 years of age; and the victim's death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty. In Alabama, a defendant is death eligible if he is found guilty of murder, the victim was under 14 years of age and, for instance, the capital offense was especially heinous, atrocious or cruel compared to other capital offenses[9] (Section 13A-5-49(8)). Notwithstanding the procedural difference in the statutes, a defendant can be sentenced to death in either state only if there is a murder plus aggravation. In framing its statute, Illinois chose to place two components in the Section 5/-1(b)(7) aggravating factor; Alabama chose to place an additional component in the definition of the capital offense. Under either procedure, the narrowing process is the same. Additionally, and importantly, the Section 5/9-1(b)(7) aggravating factor is not facially invalid and "adequately narrows the group of persons eligible for death from others guilty of murder." People v. Odle, 538 NE 2d 428, 440-41 (Ill. 1988), cert. denied, 110 S.Ct. 3289 (1990), reh'g denied, 111 S.Ct. 16 (1990).

Neither Johnson nor Woodard have cited the Court to any authority which held a death punishment statute unconstitutional because the statute defines the capital offense based on the age of the victim or because the statute considered the age of the victim as an aggravating factor. The authority appears to be to the contrary. People v. Odle. There are decisions of the United States Supreme Court which utilized a proportionality analysis to find that

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9. This aggravating circumstance, as construed and applied by the Alabama Courts, serves the narrowing function required by the Eighth Amendment to the United States Constitution. Lindsey v. Thigpen, 875 F.2d 1509 (11th Cir. 1989). See Lewis v. Jeffers, ___ U.S. ___, 110 S.Ct. 3092 (1990) (Arizona statutory aggravating circumstance that crime was committed "in especially heinous, cruel or depraved manner" was not unconstitutionally vague and over broad when Arizona Supreme Court narrowed its application by construction and consistently applied the narrowed interpretation).

a particular offense does not justify the death penalty, e.g., Enmund v. Florida, 458 U.S. 782 (1982) (the death penalty is unconstitutional where the defendant is convicted of a felony murder), Coker v. Georgia, 433 U.S. 584 (1977) (the death penalty is constitutionally excessive punishment for rape). However, when, in the opinion of the legislature,[10] a class of victims require special protection and the statutory scheme provides a meaningful method of narrowing the class of defendants who are death eligible, the statute is not constitutionally infirm.

The age criteria in the Act has a historical basis in Alabama law. At common law a child over 7 but less than 14 was presumed to be incapable of committing a felonious criminal offense. Hampton v. State, 55 So. 1018 (Ala. Ct. App. 1911). This presumption was rebuttable. Section 13A-3-3 changed the common law, and it provides that no person under 14 can be prosecuted for a criminal offense. Historically, the rationale given for this rule was that the child lacked sufficient discretion to appreciate the criminality of his conduct, Hampton; or that the child did not possess sufficient mental capacity or lacked the requisite guilty knowledge of the wrongfulness or wickedness of the act charged, Key v. State, 58 So. 936 (Ala. Ct. App. 1912); or the child could not comprehend the wrongfulness of his guilty act, Ragsdale v. State, 67 So. 783 (Ala. Ct. App. 1914).

The recognition of 14 as a level of maturity sufficient to shift responsibility to a child for his acts is reflected in other areas of Alabama law. Section 15-16-2 provides that every person over 14 is presumed, in terms of their mental state, to be responsible for their acts. Section 26-2A-76 provides that a minor 14 or older may nominate a guardian, and Section 26-2A-72 provides that a minor 14 or older may prevent the appointment of a particular guardian. Section 12-15-34 provides that the juvenile court can

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10. The specification of punishments is a question of legislative policy. California v. Ramos, 463 U.S. 992 (1983).

transfer a case to the circuit court for prosecution only when the child is over 14 years of age.[11]

The Court concludes that inasmuch as the legislature has concluded as a matter of public policy that children over 14 are mature enough to be responsible for their acts, the converse is likewise true, i.e., that children under 14 require special protection. Therefore, the legislatures' policy decision to select 14 as a component of the capital offense is neither arbitrary nor capricious.

Based on the foregoing the Court holds that the Act, when considered as a whole and in historical context, narrows the class of defendants in a rational and principled manner, and it is not unconstitutional under the United States Constitution or the Alabama Constitution. The motions to dismiss are due to be denied.

An appropriate order will enter.

DONE and ORDERED this 3rd day of August, 1993.

/s/ William Gordon

WILLIAM GORDON
CIRCUIT JUDGE

cc: Robert Lusk, Esq.
Randy McNeill, Esq.
Maurice Bell, Esq.
Richard Keith, Esq.
Richard Cohen, Esq.
Dean Mooty, Esq.

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11. Other examples can be found in Ala. Code § 25-8-1; § 35-6-82, § 5-11A-32; §26-2A-75; and § 35-5A-19.

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. CC-93-604-G

STATE OF ALABAMA,

Plaintiff,

v. ORDER

SUSAN AMELIA WOODARD,

Defendant.

_____/

Susan Woodard (Woodard) has filed a motion to postpone the trial so that she can seek appellate review of this Court's order which denied her motion to dismiss the indictment. The State objects to a postponement for numerous reasons, among them that a petition for writ of mandamus has not been filed. The Court finds that the trial should be postponed for the reasons stated below.

In the court's prior order, it recited the bare facts set out in the indictment against Woodard. The Court takes this opportunity to enlarge its statement of the facts, and notes that this summation is taken from Woodard's statement and the report of the medical examiner, James R. Lauridson, M. D.[1]

1. Woodard strongly contests the accuracy of her statement because she says she misunderstood the questions and her answers conflict in many respects. The Court has summarized the facts in a manner most favorable to the State.

Woodard was a licensed day care mother and she had been caring for Elizabeth Dowe Franklin (Dowe) since July or August of 1992. The events which form the basis of the State's case against her occurred during the period from December 29, 1992 through January 6, 1993, the date Dowe died.

On December 29, 1992 Dowe was being cared for in Woodard's home. Dowe and Woodard's child were in the laundry room and Dowe apparently fell. In an aggravated state, Woodard jerked Dowe up from the laundry room floor and Dowe's head popped back and bounced off the wooden floor. Woodard then sort of pushed Dowe down and her head hit the Floor again. Woodard then snatched Dowe up by both arms and she thinks that the child's head hit the floor a third time. Woodard realized that she had hurt Dowe, but the child was not unconscious and "didn't never really cry." Dowe was "like maybe she had her senses knocked crazy for a minute." Woodard then "threw her in a playpen so her head went back again. After this the child was groggy but ate spaghetti and took a nap.

That evening Dowe's mother, Dale Franklin, called Woodard and asked if Dowe had fallen that day because she was throwing up and had a knot on her head. Woodard did not tell Mrs. Franklin about the incident at her house.

On January 6, 1993 Dowe was brought to Woodard's house and she was groggy and sleepy. Dowe was placed in the playpen and at some point Woodard noticed that Dowe had thrown up and appeared to be unconscious. Woodard shook Dowe causing her head to bob three or four good times. At some point Woodard thought that, perhaps, the shaking broke Dowe's neck. The paramedics were eventually called and Dowe was taken to the hospital were she later died.

The forensic examiner's report shows, among other things, that the child had bruises on her right and left upper arms, and Dr. Lauridson is of the opinion that death

was "as a result of complications of a closed head injury resulting in subdural hematoma and cerebral edema".

The above-recited facts are intended to be included in the statement of facts, in this Court prior order.

Woodard's counsel represent that they will file a petition for writ of mandamus no later than the close of business on August 13, 1993. At the hearing counsel represented that the main thrust of its argument will be that predicating the capital offense of the death of a child under fourteen was an arbitrary and capricious legislative act and violative of the federal and state constitutions. In Woodard's motion to dismiss the indictment, Woodard also suggested, but did not argue, that the statute was unconstitutional as applied in the facts of this case.

As noted in the Court's prior order, 1992 Ala. Acts 601 added three new capital offenses to the Alabama Death Act. There is a suggestion, but no proof, that these new capital offenses were enacted to address the problem of "drive-by shootings". The attack on the section at issue, Ala. Code Section 13A-5-40(a)(150, presents a question of first impression in this state. The Court recognizes the grounds for the State's objection to Woodard's motion. In addition, the Court, as does the State, also recognizes that no party wishes to try this case twice in the event Section 13A-5-40(a)(15) is ultimately found to violate the state of federal constitutions.

The Court is confident in the correctness of its order denying Woodard's motion to dismiss the indictment in this case; however, under the circumstances this Court also believes that Woodard should have the opportunity to seek appellate review before the case is tried. The Court recognizes that the appellate court may decline to review this matter.

For the foregoing reasons, it is ORDERED that the trial of this case is postponed if woodard's counsel files a petition for writ of mandamus before the close of business on August 13, 1993.

DONE and ORDERED on the 12th day of August, 1993.

/s/ William Gordon

WILLIAM GORDON
CIRCUIT JUDGE

cc: Robert Lusk, Esq.
Randy McNeill, Esq.
Maurice Bell, Esq.
Richard Keith, Esq.
Richard Cohen, Esq.
Dean Mooty, Esq.

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1992-93

CR 92-1868

Ex parte: Susan Amelia Woodard

(In re: State of Alabama vs. Susan Amelia Woodard)

Montgomery Circuit Court No. CC-93-604

PETITION FOR WRIT OF MANDAMUS

BOWEN, PRESIDING JUDGE

This a petition for writ of mandamus challenging the constitutionality of the capital offense defined in Ala. Code 1975, Section 13A-5-40(a)(15), which we term "child-murder."

The petitioner, 37-year-old Susan Amelia Woodard was indicted for the capital murder of a 15-month-old Elizabeth B. Dowe Franklin. The events that form the basis of the State's case occurred on December 29, 1992, and January 6, 1993. On these two dates, the infant was under the care of petitioner, a licensed day care person, who allegedly shook the infant and allegedly caused the infant to hit her head on the floor. The infant died on January 6, 1993, "'as a result of complications of a closed head injury resulting in subdural hematoma and cerebral edema.'" Order of the circuit court, August 12, 1993, p. 3.

EXHIBIT "C"

On April 28, 1993, the petitioner, moved to dismiss the indictment arguing that the statute on which the indictment was based, Ala. Code 1975, Section 13A-5-40(a)(15), was unconstitutional. On July 2, 1993, the trial court held a hearing on the matter. On August 3, 3993, the trial court issued a written order denying the motion to dismiss and upholding the constitutionality of the statute. That order was supplemented by a second order dated August 12, 19932, in which the trial judge set out the State's factual allegations and postponed the trial of the case to allow the petitioner the opportunity to seek appellate review of the denial of the motion to dismiss the indictment.

This Court is well aware that "[p]etitions for writ of mandamus cannot be substituted for appeals to review adverse legal rulings of lower courts." Because the petitioner could ultimately challenge on direct appeal from any conviction the trial court's denial of her motion to dismiss, that matter is not properly reviewable by petition for writ of mandamus. See Ex parte Fowler, 574 So.2d 745, 747 (Ala. 1990). "'This for the reason, that appellate courts will not hear causes in piecemeal.'" Id. (quoting Koonce v. Arnold, 244 Ala. 513, 514, 14 So.2d 512, 515 (1943)). Nevertheless, in the interests of judicial economy and under the authority granted this Court by Section 12-3-11, we deem it appropriate to address the merits of this petition. See Ex parte Jackson, 614 So.2d 408 (Ala. 1993) (reviewing on petition for writ of mandamus trial court's denial of defendant's motion to dismiss).

Act No. 92-601, 1992 Ala. Acts 1247, amended Alabama's criminal code Section 13A-5-40 to include as a capital offense "[m]urder when the victim is less than fourteen years of age." Ala. Code 1975, Section 13A-5-40(a)(15). As this Court understands the petitioner's arguments, the petitioner contends that this child-murder provision is unconstitutional because 1) it is arbitrary, overbroad, and discriminatory in that it predicates the capital offense solely on the age of the victim; 2) the subsection is vague

and fails to sufficiently narrow the class of people which may become "death eligible"; and 3) the subsection "is contradictory and in diametric opposition to the legislative intent which underlies the purpose of the statute as a whole" because the subsection does not include as an element of the offense at least one of the aggravating factor listed in Section 13A-5-49. (Petition for writ of mandamus at 8). We reject each of these arguments.

I

Section 13 A-5-40(a)(15), the child-murder provision of Alabama's capital offense statutes is not unconstitutionally overbroad.

> "'The overbreadth doctrine derives from the First Amendment, See Young v. American Mini Theaters, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976); Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), and serves to invalidate legislation so sweeping that, along with its allowable proscriptions, it also restricts constitutionally-protected rights of free speech, press, or assembly, see e.g., Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). Since there are no First Amendment rights at stake here, the overbreadth doctrine does not apply. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 n. 9, 102 S.Ct. 1186, 1192 n. 9, 71 L.Ed.2d 362 (1982).

McCall v. State, 565 So.2d 1163, 1165 (Ala.Cr.App. 1990).

> "The doctrine of overbreadth recognizes that a state legislature may have a legitimate and substantial interest in regulating particular behavior, but 'that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton v. Tucker, 364 U.S. 479, 488 . . .

(1960). Historically, the overbreadth doctrine has been used by the federal courts to prevent a chilling effect on First Amendment freedoms. Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 852 (1970). . . . However, the overbreadth doctrine under the Alabama Constitution has been applied in due process cases not involving first amendment freedoms. See Ross Neely Express, Inc. v. Alabama Department of Environmental Management, 437 So.2d 82 (Ala. 1983).

"Justice Adams, for the full Court in RossNeely Express, wrote:

> "'The right to due process is guaranteed to the citizens of Alabama under the Alabama Constitution of 1901, Article 1, Sections 6 and 13. This constitutional right to due process applies in civil actions as well as criminal proceedings. Pike v. Southern Bell Telephone and Telegraph Co., 263 Ala. 59, 81 So.2d 254 (1955). The Courts have found that this right is violated when a statute or regulation is unduly vague, unreasonable or overbroad . . . .'
>
> "'In reviewing a regulation of a county Board or Health, this court held that the central issue was reasonableness. Baldwin County Board of Health v. Baldwin County Electric Membership Corporation, 355 So.2d 708 (Ala. 1978. In City of Russellville v. Vulcan Materials Co., 382 So.2d 525 (Ala. 1980), this court said:
>
> "'"The validity of a police power regulation . . . under that the existing circumstances, the regulation is reasonable, and whether it is really designed to

> accomplish a purpose properly falling within the scope of the police power. Crabtree v. City of Birmingham, 292 Ala. 684, 299 So.2d 282 (1974). Otherwise expressed, the police power may not be employed to prevent evils of a remote or highly problematical character. Nor may its exercise be justified when the restraint imposed upon the exercise of a private right is disproportionate to the amount of evil that will be corrected. Bolin v. State, 266 Ala. 256, 96 So.2d 582, conformed to in 39 Ala.App. 161, 96 So.2d 592 (1957)."'
>
> "'Statutes and regulations are void for overbreadth if their object is achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. See Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967); Keylishian v. Board of Regents, 385 U.S. 389, 87 S.Ct. 675, 17 L.Ed. 2d 629 (1967).'
>
> "437 So.2d at 84-85."

Friday v. Ethanol Corp., 539 So.2d 208, 315-216 (Ala. 1988).

We find that Ala. Code 1975, Section 13A-5-40(a)(15), is reasonable and invades no area of protected freedoms. The only act forbidden by that subsection is an intentional killing — a murder. The appellant has no right to murder a 15-month-old child. Murder is not a constitutionally protected activity.

> "[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment. See Roberts v. United States Jaycees, 468 U.S. 609, 628, 104 S.Ct. 3244, 3255,

> 82 L.Ed.2d 462 (1984) '[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection'); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916, 102 S.Ct. 3409, 3427, 73 L.Ed.2d 1215 (1982) ('The First Amendment does not protect violence')."

Wisconsin v. Mitchell, 508 U.S. ____, 113 S.Ct. 2194, 2199, 124 L.Ed.2d 436, 444-45 (1993).

II

Section 13A-5-40(a)(15) is not unconstitutionally vague.

> "'The doctrine of vagueness, . . . originates in the due process clause of the Fourteenth Amendment, see Lanzetta v. New Jersey, 306 U. S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), and is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful, see United States v. National Dairy Products Corporation, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963).
>
> "'Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989, 996 (1954). A vague statute does not give adequate "notice of the required conduct to one who would avoid its penalties," Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367, 371 (1951), is not "sufficiently focused to forewarn of both

its reach and coverage," United States v. National Dairy Products Corporation, 372 U.S. at 33, 83 S.Ct. at 598, 9 L.Ed.2d at 566, and "may trap the innocent by not providing fair warning," Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227-28 (1972).

"'As the United States Supreme Court observed in Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 849 (1948):

"'"There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt."'

"'333 U.S. at 515-16, 68 S.Ct. at 670, 92 L.Ed.2d [at] 849-50 [citations omitted].'

"McCrary v. State, 429 So.2d 1121, 1123-24 (Ala.Cr.App. 1982), cert. denied, 464 U.S. 913, 104 S.Ct. 273, 78 L.Ed.2d 254 (1983)."

McCall v. State, 565 So.2d 1163, 1165 (Ala.Cr.App. 1990).

"It is well settled that, in order to pass constitutional muster, a penal statute must 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' Kolender v. Lawson, 461 U.S. 352, 357, 103 U.S. 1855, 1858, 75 L.Ed.2d 903 (1983) (citations omitted).

> "'Due process requires that all "be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939), and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. Connally v. General Construction, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).'
>
> 'Smith v. Goguen, 415 U.S. 566, 574, 94, S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1974)."

Senf v. State, [Ms. CR 91-1207, February 12, 1993] ____ So.2d ____ (Ala.Cr.App. 1993). Here, Section 13A-5-40(a)(15) provides fair warning of what is forbidden. See Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). Clearly, this section informs ordinary people of the prohibited conduct. See Wright v. State, 599 So.2d 637, 638 (Ala.Cr.App.), cert. denied, 609 So.2d 452 (Ala. 1992).

Furthermore, the petitioner has no legitimate ground to complain that Section 13A-5-40(a)(15) is unclear as to her conduct. "Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." Jordan v. State, 411 So.2d 816, 818 (Ala.Cr.App. 1981).

> [B]ecause '[t]he essential purpose of the "void for vagueness" doctrine is to warn individuals or the criminal consequences of their conduct,' Jordan v. De George, 341 U.S. 223, 230, 71 S.Ct. 703, 707, 95 L.Ed. 886 (1951), '[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness,' Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974), 'even though the statute may well be vague as applied to others,' Aiello v. City of Wilmington, 623 F.2d 845, 850 (3d Cir. 1980). Therefore, a defendant who challenges a statute

> on the grounds of vagueness 'must demonstrate that the statute under attack is vague as applied to his own conduct, regardless of the potentially vague applications to others.' Aiello, 623 F.2d at 850 (emphasis added). Accord Rode v. Dellarciprete, 845 F.2d 1195, 1199-1200 (3d Cir. 1988)."

Senf, ____ So.2d at ____ (footnote omitted). The petitioner has failed to meet that burden.

III

The petitioner claims that the Section 13A-5-40)a)(15) is unconstitutional because it is arbitrary and because the subsection fails to sufficiently narrow the class of people that may become "death eligible." We reject these contentions.

> "A capital sentencing scheme must, in short, provide a '"meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."' [Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976)], quoting Furman v. Georgia, [408 U.S. 238, 313, 92 S.Ct. 2726, 2763, 33 L.Ed.2d 346 (1972)] (White, J., concurring).
>
> "This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

Godfrey v. Georgia, 446 U.S. 420, 426-428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398, 406 (1980).

Alabama's capital offense statutes include a sentencing scheme that is neither arbitrary nor capricious. Ex parte Hays, 518 So.2d 768, 774 (Ala. 1986); Daniels v. State, 534 So.2d 638, 642-45 (Ala.Cr.App. 1985), aff'd 534

So.2d 656 (Ala. 1986), cert. denied, 479 U.S. 1040, 197 S.Ct. 898, 93 L.Ed.2d 850 (1987).

> "The Supreme Court has required heightened reliability in the imposition of the death penalty, but the Court has not mandated any particular state statutory approach to capital punishment. To minimize the risk of arbitrary action and provide individualized sentencing, however, the Court has imposed two general requirements of the capital sentencing process. First, a state must channel the sentencer's discretion in order to 'genuinely narrow the class of persons eligible for the death penalty and . . . [thus] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' Second, the State may not limit the sentencer's consideration of any relevant evidence that might lead the sentencer to decline to evidence that might lead the sentencer to decline to impose the death penalty.
>
> "The required narrowing of the class of death-eligible defendants may occur at either the guilt or the sentencing phase of a capital trial. When narrowing is accomplished during the sentencing phase, the sentencer determines whether certain characteristics of the crime, known as aggravating circumstances, distinguish the gravity of the offense so as to justify the imposition of the death penalty."

Daniel F. McInnis et al., Project, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992, 81 Geo.L.J. 853, 1471-73 (1993) (footnotes omitted).

The required narrowing of the class of death-eligible defendants accused of violating Section 13A-5-40(a)(15) occurs at the sentencing phase of the capital trial when the

sentencer must determine the existence of at least one of the aggravating circumstances listed in Section 13A-5-49. See Sections 13A-5-46(e); 13A-5-47(d) and (e). Furthermore, '[t]he statutory aggravating circumstances may not be added to or expanded." Nelson v. State, 405 So.2d 392, 400 (Ala.Cr.App. 1980) reversed on other grounds, 405 So.2d 401 (Ala. 1981).

In order for a defendant to be sentenced to death upon a conviction under Section 13A-5-40(a)(15), the defendant must be guilty of the intentional murder of a child under the age of 14 years and the sentencer must find the existence of at least one of the aggravating circumstances enumerated in Section 13A-5-49, thereby narrowing the class of "death eligible" defendants.

IV

The petitioner asserts that Section 13A-5-40(a)(15) is unconstitutional because it "is contradictory and in diametric opposition to the legislative intent which underlies the purpose of the statute as a whole." The gist of her argument is that a capital offense defined in Section 13A-5-40 must include as an element at least one of the aggravating circumstances set forth in Section 13A-5-49. This argument is without merit.

Under our current statutory scheme, a "capital offense" is "[a]n offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole according to the provisions of . . . [A]rticle [2 of Chapter 5 of Title 13A]." Section 13A-5-39(10) (emphasis added). The specific forms of conduct that the legislature has declared to be "capital offenses" are set forth in Section 13A-5-40 (Supp. 1993). Each of these offenses consists of an intentional murder coupled with some other element, e.g., that the murder was committed during the commission of certain other felonies (kidnapping, robbery, rape, sodomy, burglary, sexual abuse, and arson), Section 13A-5-

40(a)(1), (2), (3), (4), (8), and (9); that the murder was committed for pecuniary gain, Section 13A-5-40(7); and that the victim was a law enforcement officer, Section 13A-5-40(5). Although this other element" is sometimes referred to as an "aggravating circumstance," Kuenzel v. State, 577 So.2d 474, 490 (Ala. Cr.app. 1990), affirmed, 577 So.2d 531 (Ala.), cert. denies ____ U.S. ____, 112 S.Ct. 242 (1991), Crow v. State, 485 So.2d 351, 367 (Ala.Cr.App. 1984), reversed on other grounds, 485 So.2d 373 (Ala. 1985), cert. denied, 477 U.S. 909 (1986), the Section 13A-5-40 "other element" should not be confused with the statutory aggravating circumstances set out in Section 13A-5-49.

A number, but not all, of the Section 13A-5-40 capital offenses include as "other elements" conduct that clearly corresponds to one or more of the aggravating circumstances specified in Section 13A-5-49. For example, the capital offense of intentional murder during a rape, Section 13A-5-40(1)(3), intentional murder during a robbery, Section 13A-5-40(a)(2), intentional murder during a burglary, Section 13A-5-40(a)(4), and intentional murder during a kidnapping, Section 13A-5-40(a)(1), parallel the aggravating circumstance that "[t]he capital offense was committed while the defendant was engaged . . . [in a] rape, robbery, burglary or kidnapping," Section 13A-5-49(4). However, other capital offenses, such as intentional murder during a sodomy, Section 13A-5-40(a)(3), intentional murder during sexual abuse, Section 13A-5-40(a)(8), the intentional murder of two or more persons by one act or course of conduct, Section 13A-5-40(a) (10), and the offense of which the petitioner is accused, the intentional murder of a child, Section 13A-5-40(a)(15), do not parallel any aggravating circumstance enumerated in Section 13A-5-49. See Ex parte Kyzer, 399 So.2d 330, 334 (Ala. 1981) (recognizing as "an anomaly" in the former capital offense statutes that "there [wa]s a corresponding aggravating circumstance for most, but not all, of the aggravated offenses").

The fact that Section 13A-5-40(a)(15) does not parallel a statutory aggravating circumstance does not render that Section "contradictory and in diametric opposition to the legislative intent which underlies the purpose of the statute as a whole." To the contrary, the legislature has clearly classified certain crimes as "capital offenses," Section 13A-5-40, and it has set the minimum punishment for such crimes as imprisonment of life without parole, see Sections 13A-5-45(f); 13A-5-46(3)(1). This is no different from the legislature's classifying other offenses for purposes of punishment and establishing minimum and maximum punishments for each classification. See Sections 13A-5-3; 13A-5-6; 13A-5-7. A greater punishment — death — may be imposed on a defendant convicted of a capital offense, but only if one or more of the aggravating circumstances enumerated in Section 13A-5-49 is found to exist and that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may exist. See Sections 13A-5-45(f); 13A-5-46(e); 13A-5-47(3). Cf. Ex parte Kyzer, 399 So.2d at 334 (under former capital offense statutes, death sentence could not be upheld where defendant was convicted of the intentional murder of three persons in one course of conduct, but no statutory aggravating circumstances existed); Holladay v. State, 549 So.2d 122, 133 (Ala.Cr.App. 1988) (death sentence upheld where defendant was convicted of the intentional murder of three persons in one course of conduct and two Section 13A-5-49 aggravating circumstances existed), affirmed, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012 (1989).

From the foregoing, it is clear that the petitioner is incorrect in her assertion that a defendant convicted of the capital offense of child murder is "death eligible" based solely on the age of the victim. As the trial court stated: "When no aggravating circumstance mirrors the capital offense, the defendant does not become death eligible until the State proves an aggravating circumstance in the punishment phase." Order of the circuit court, August 3, 1993, at 6 n.6.

V

Finally, we reject the petitioner's argument that Section 13A-5-40(a)(15) is arbitrary. In this regard, in its order of August 3, 1993, the trial court found:

> "Neither Johnson[1] nor Woodard have cited the Court to any authority which held a death punishment statute unconstitutional because the statute defines the capital offense based on the age of the victim or because the statute considered the age of the victim as an aggravating factor. The authority appears to be to the contrary. People v. Odle [538 N.E.2d 428, 440-41 (Ill. 1988), cert. denied, ___ U.S. ___, 110 S.Ct. 3289 (1990) [court upheld sentence of death where the "death eligible" factor was that the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty]. There are decisions of the United States Supreme Court which utilized a proportionality analysis to find that a particular offense does not justify the death penalty, e. g. Enmund v. Florida, 458 U.S. 782 (1982) (the death penalty is unconstitutional where the defendant is convicted of a felony murder), Coker v. Georgia, 433 U.S. 584 (1977) (the death penalty is constitutionally excessive punishment for rape). However, when, in the opinion of the legislature, a class of victims require special protection and the statutory scheme provides a meaningful method of narrowing the class of

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1. James Johnson, Jr., and Susan Amelia Woodard (the petitioner), were separately indicted for capital offenses under Ala. Code 1975, section 13A-5-40(a) (15). Each offense is separate and involves a different victim. Each defendant filed a motion to dismiss the indictment, challenging the constitutionity of Section 13A-5-40(a)(15). The circuit court consolidated the cases "for the singular purpose of ruling on these motions." Order of the circuit court, August 3, 1993, at 1.

defendants who are death eligible, the statute is not constitutionally infirm.

"The age criteria in the Act has a historical basis in Alabama law. At common law a child over 7 but less than 14 was presumed to be incapable of committing a felonious criminal offense. Hampton v. State, 55 So. 1018 (Ala.Cr.App. 1911). This presumption was rebuttable. Section 13A-3-3 changed the common law, and it provides that no person under 14 can be prosecuted for a criminal offense. Historically, the rationale given for this rule was that the child lacked sufficient discretion to appreciate the criminality of his conduct, Hampton; or that the child did not possess sufficient mental capacity or lacked the requisite guilty knowledge of the wrongfulness or wickedness of the act charged, Key v. State, 58 So. 946 (Ala.Ct.App. 1912); or the child could not be comprehend the wrongfulness of his guilty act, Ragsdale v. State, 67 So. 783 (Ala.Ct.App. 1914).

"The recognition of 14 as a level of maturity sufficient to shift responsibility to a child for his acts is reflected in other areas of Alabama law. Section 15-16-2 provides that every person over 14 is presumed, in terms of their mental state, to be responsible for their acts. Section 26-2A-76 provides that a minor 14 or older may nominate a guardian, and Section 16-2A-72 provides that a minor 14 or older may prevent the appointment of a particular guardian. Section 12-15-34 provides that the juvenile court can transfer a case to the circuit court for prosecution only when the child is over 14 years of age.

"The Court concludes that inasmuch as the legislature has concluded as a matter of public policy that children over 14 are mature enough to be responsible for their acts, the converse is likewise

> true, i.e., that children under 14 require special protection. Therefore, the legislatures' policy decision to select 14 as a component of the capital offense is neither arbitrary nor capricious."

Order of circuit court, August 3, 1993 at 9-11 (footnotes omitted).

As noted by the Attorney General in its answers to the petition, the Alabama Legislature in other subsections of Section 13a-5-40, has seen fit to provide the death penalty for the intentional killing of a member of certain classes of persons, including a police officer or other specified law enforcement officers (subsection (a)95)), a public official (subsection (a)(11)), and a witness (subsection (a)(14)). The "cop killing" capital murder provision was upheld in Ex parte Harrell 470 So.2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985).

In the Alabama Criminal Code alone, the Alabama Legislature has repeatedly recognized that children are entitled to certain protections not afforded adults. See Section 13A-3-3 ("The prosecution of any person as an adult shall be barred if the offense was committed when the actor was less than 14 years old."); Section 13A-6-45 (interference with custody); Section 13A-6-61(a)(3) (rape in the first degree); Section 13A-6-62(a)(1) (rape in the second degree); Section 13A-6-63(a)(3) (sodomy in the first degree); Section 13A-6-66 (a)(3) (sexual abuse in the first degree); Section 13A-6-67(a)(2) (sexual abuse in the second degree); Section 13A-6-69 (enticing child to enter vehicle, house, etc., for immoral purposes); Section 13A-6-70(c)(1) (providing that a person is deemed incapable of consent to certain sexual offenses if that person is less than 16 years old); Section 13a-11-76 (prohibiting the delivery of a pistol to a minor); Section 13A-12-111(a)(2) (promoting prostitution in the first degree); Section 13A-12-191 (Prohibiting the dissemination of public display of obscene matter containing visual reproduction of persons under 17 years of age involved in obscene acts); Section 13A-12-192 (pro-

hibiting the possession of obscene matter containing visual reproduction of persons under 17 years of age involved in obscene acts; (prohibiting parents or guardians from permitting children to engage in production of obscene matters); Section 13A-12-197 (Prohibiting the production of obscene matter depicting persons under 17 years of age involved in obscene acts); Section 13A-13-3 (Incest); Section 13A-13-4 (nonsupport); Section 13A-13-5 (abandonment of a child); Section 13A-13-6 (endangering the welfare of a child); Section 13A-12-200.1(16) (defining the term "harmful to minors" in connection with Alabama's Anti-Obscenity Enforcement Act); Section 13A-12-200.5 (Prohibiting the distribution of material harmful to minors); Section 13a-12-215 (Prohibiting the sale, furnishing, etc., of controlled substances by persons over age 18 to persons under age 18); and Section 13a-12-250 (providing for an additional penalty for the unlawful sale of a controlled substance on or near school campus).

The child-murder provision is not arbitrary and does not violate any equal protection right.

> "'The Equal Protection Clause of the Fourteenth Amendment goes no further than to prohibit invidious discrimination. . . . If there is some reasonable basis for the recognition of separate classes, and if the disparate treatment of the classes has a rational relation to the object sought to be achieved by the lawmakers, the Constitution is not offended. The transgression arises only when the classification rests upon grounds wholly irrelevant to achievement of the State's objective; the separate treatment must admit of but one conclusion beyond a rational doubt, i.e., that the basis therefore is arbitrary and unreasonable and without relevance to the legislative goal.'"

Goodson v. State, 588 So.2d 509, 514 (Ala.Cr.App. 1991) (quoting State v. Thompson, 133 N.J.Super 189, 336 A.2d

11, 14 (1975)). "'Because the statute does not proscribe activities that are legally protected and does not involve any legally cognizable "suspect" class, "the classification must be upheld if 'any state of facts rationally justifying it is demonstrated to or perceived by the court.'" United States v. Holland, 810 F.2d 1215, 1219 (D.C.Cir.), cert. denied, 481 U.S. 1057, 107 S.Ct. 2199, 95 L.Ed.2d 854 (1987).'" Hardy v. State, 576 So.2d 685, 686 (Ala.Cr.App. 1991) ("'The legislature of alabama "wanted to lessen the risk that drugs would be readily available to school children. It is surely rational to achieve that goal by increasing penalties for those who sell drugs near schools,"'"). Here, the classification adopted by the Legislature of child-murder as a capital offense is not arbitrary and capricious, but reasonable and appropriate.

Based upon all of these considerations, we hold that Section 13A-5-40(a)(15) is not arbitrary. See generally Plitt v. Griggs, 585 So.2d 1317, 1324 (Ala. 1991).

It is the holding of this Court that Ala. Code 1975, Section 13A-5-40(a)(15) is not unconstitutional. The petition for writ of mandamus is denied.

PETITION DENIED.
All Judges concur.

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

92-1868

Ex parte: Susan Amelia Woodard
(In re: State of Alabama vs. Susan Amelia Woodard)
Petition for Writ of Mandamus
Montgomery Circuit Court No. CC93-604-G

ORDER

It is ORDERED that the application for rehearing filed in the above cause be and the same is hereby overruled.

It is further ORDERED that the request for additional facts pursuant to Rule 39(k) of the Alabama Rules of Appellate Procedure be and the same is hereby denied.

WITNESS, this the 30th day of September, 1993.

/s/ Lane W. Mann

LANE W. MANN, CLERK
COURT OF CRIMINAL APPEALS

cc: Judge William Gordon
Ms. Debra Hackett, Circuit Clerk
Maurice Bell, Esq.
Richard Keith, Esq.
Ellen Brooks, Esq., District Attorney
Joseph G. L. Marston, III, Assistant Attorney General

cca\wki

EXHIBIT "D"

IN THE SUPREME COURT OF ALABAMA

February 4, 1994

1930078

Ex parte Susan Amelia Woodard. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Susan Amelia Woodard v. State) (92-1868) (Montgomery: CC-93-604)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COSTS TAXED TO PETITIONER.

ALMON, J. - Hornsby, CJ., Shores, Houston, Steagall, Kennedy, Ingram and Cook, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears(s) of record in said Court.

Witness my hand this 4th day of Feb., 1994.

/s/ ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

EXHIBIT "E"